

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850

www.montgomerycountymd.gov/content/council/boa/index.asp

(240) 777-6600

Case No. S-2818

PETITION OF TWIN FARMS CLUB, INC. AND T-MOBILE NORTHEAST, LLC

OPINION OF THE BOARD

(Opinion Adopted January 25, 2012)

(Effective Date of Opinion: February 9, 2012)

Case No. S-2818 is an application, pursuant to Section 59-G-2.58 of the Zoning Ordinance, for a special exception to construct an unmanned wireless telecommunications facility on a 125-foot tall monopole, designed as a flagpole, with antennas centered at 120 feet inside the pole, and an associated equipment area. The application requests nine setback waivers: a 17-foot reduction of the 1:1 setback [one foot for every foot of height of the cell tower] from the southern [front] property line as required by Section 59-G-2.58(a)(1)(A) and eight reductions of the required 300-foot setback from the twelve nearest off-site dwellings as set forth in Section 59-G-2.58(a)(2)(A). The subject property is Lot N806, located at 1200 Fairland Road, Silver Spring, Maryland, 20904, in the R-200 Zone.

The Hearing Examiner for Montgomery County held a hearing on the application on September 30, 2011, closed the record in the case on October 21, 2011, and on November 21, 2011 issued a Report and Recommendation for denial of the special exception. On November 30, 2011, the Board of Appeals received timely requests for Oral Argument on the Report and Recommendation from Jay Hagler, Board Chairman of Twin Farms Club, Inc., and from Edward Donohue, Esquire on behalf of T-Mobile Northeast, LLC. At its Worksession on December 7, 2011, the Board of Appeals granted the requests for Oral Argument, which took place on January 25, 2012.

Decision of the Board: Special Exception **Denied.**

Oral Argument

At Oral Argument, Mr. Donohue stated that the Hearing Examiner erred in adopting the recommendation of Maryland National Capital Park and Planning Commission (MNCPPC) Technical Staff and the Planning Board that the size of the subject property and more specifically the width of the property constituted an impact that required denial of the special exception. On behalf of the Applicants he argued that the testimony and evidence given at the public hearing required approval of the application. He stated that the site was selected to take advantage of topography and existing tree cover, and that there was uncontroverted testimony about the tree cover.

Mr. Donohue noted that the Hearing Examiner wrote she would have approved the application if the waiver from Fairland Road, were the only waiver requested, because “the topography and existing vegetation along Fairland Road and the additional evergreen plantings shown on the site plan would effectively reduce the visual impact from the street.....Given the height of the trees (approximately 70 feet) the visual impact from the street would be minimal...” [p. 21, Report]. Mr. Donohue stated that the Report recommended denial of the setback from Fairland Road because of the number of waivers requested and more specifically, the waivers east and west of the parcel from adjacent residences.

In response to a Board question about what evidence there is that the proposed location is in a less visually obtrusive location than if it complied with the property line setback, Mr. Donohue stated that the location which would comply with the setback is more exposed. He pointed to Mr. Shabshab’s testimony “that he believed the cell tower would be ‘more visible’ at this location than if it were sited in its proposed location because this is more open and did not include the same type of ground and tree cover as along Fairland Road.” [Tr. 131-133.]

Mr. Donohue referred to the testimony of record that the property is 300’ wide and 600’ deep and the testimony that tree cover on either side screens the proposed facility. He stated that the Applicant has proposed an additional 30 trees around the compound. Mr. Donohue stated that it is perhaps most telling that the Hearing Examiner characterized the subject property as “extremely narrow”.

The Board inquired whether there were photos of the balloon test in the record taken from any of the adjacent properties. Mr. Hagler referred to Exhibit Nos. 72 and 74, which are photos taken from the swim club looking toward those properties. There are no photos in the record taken from the adjacent properties looking toward the proposed site of the facility.

Mr. Donohue stated that it is significant that the County Council enacted a waiver provision for the required setbacks, rather than requiring variances, and that there is no threshold requirement in the standards that there must be a location on the property where the proposed facility would meet all required setbacks before waivers can be granted. Mr. Donohue stated that the adjoining neighbors do not object to the proposal, and that the neighbors' opinions are relevant to a determination of whether a location is less visually obtrusive for the purposes of the waiver provision.

Mr. Donohue stated that T-Mobile had made a number of concessions in the application responding to concerns expressed about the proposal, including design changes, a reduction in imperviousness, reduction to the gated entrance, stealth design, addition of 30 trees, no tree removal and no grading.

Mr. Hagler stated that there is a documented need for cell coverage. He stated that based on the testimony and evidence of record, there really is no other feasible location for the facility. He believes that but for the setback issues, the application would have been approved. The neighbors support the application. He opined that the question is whether the setback reductions are reasonable and urged the board to consider what's best for the overall community.

Findings and Conclusions

Section 59-G-2.58(a) of the Montgomery County Zoning Ordinance provides, in pertinent part, that a telecommunications facility must satisfy the following standards:

(1) A support structure must be set back from the property line as follows:

A. In agricultural and residential zones, a distance of one foot from the property line for every foot of height for the support structure.

D. The Board of Appeals may reduce the setback requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.

(2) A support structure must be set back from any off-site dwelling as follows:

A. In agricultural and residential zones, a distance of 300 feet.

D. The Board of Appeals may reduce the setback requirement in the agricultural and residential zones to a distance of one foot from an off-site residential building for every foot of height of the support structure if the applicant requests a reduction and evidence indicates that a support structure can be located in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, and visibility from the street.

After careful consideration and review of the record and the arguments at Oral Argument, the Board finds that the application must be denied. The Board adopts the Hearing Examiner's Report and Recommendation with the exception of her findings that the number of waivers requested is a reason to deny the application. The Board agrees with the Hearing Examiner that there is no need in this case to decide whether there must be a location on the property where the proposed facility would meet all required setbacks before waivers can be granted. The Board also finds, however, that there is no need to decide whether there is some upper limit on the number of setback waivers that can be requested or granted in a single application. This application is denied because the Applicants have not made a factual case to support their waiver requests, and without the waivers the application cannot meet the requirements for approval.

With regard to the property line setback, the Board agrees with the Hearing Examiner "that the Petitioner did not present sufficient evidence to show that the proposed facility is in a 'less visually obtrusive location than if it had been sited to comply with the 125-foot property line [setback] in the open area north of the basketball court.'" [Report, p. 21]. The setback-compliant location is at the same or nearly the same elevation as the Applicants' proposed location, and, as the Hearing Examiner stated, "it is arguable that at this [compliant] location the visibility from the street would be even less than at the proposed location" because of the surrounding vegetation. [Report, p. 22]. A location inside the required setback that is equally or less well screened than a location set back the required distance from the property line does not qualify for a waiver

With regard to the adjacent residences, the evidence does not show that the proposed location is less visually obtrusive. We agree with the Hearing Examiner that the evidence does not support a finding that the particular location was chosen in order to mitigate the facility's visual impact. [Report, p. 23]. Indeed, Applicants' engineer testified that, at the direction of the property owner, no location on the site other than the proposed location was considered [Transcript, p. 121].

Both the Hearing Examiner and Technical Staff of the Planning Board concluded that “the site is extremely narrow and does not offer appropriate buffers from the east to west property line in order to visually reduce the bulk or scale of this tower especially due to proximity to some of the adjoining houses where the greatest setbacks are requested.” [Report, p. 22]. The Board agrees. Applicants provided no photographs of the balloon test taken from the adjacent residential properties. Applicants’ desire to avoid trespassing is commendable, but given that there are three letters of support from adjacent property owners in the record [Exhibit Nos. 59, 69 70], presumably those property owners, and perhaps others, would have consented to having photos taken from their properties had they been asked. Parenthetically, the opinions of the current adjoining property owners are relevant but hardly conclusive on the question of visual impact since future owners may have a different opinion. Technical Staff, who visited the site (Ex. No. 68, p.3], observed that even in summer the proposed site was visible through the trees from adjacent properties.

Visual obtrusiveness of the tower is likely to be highest in the winter. Technical Staff found that most of the trees on the east and west property boundaries of the subject property are deciduous, increasing visibility of the proposed site during fall and winter months. This is supported by an aerial photograph reproduced in the Report at p. 7 that shows winter tree cover is thin. Applicants presented no views from the adjacent residences toward the subject property in winter to counter this evidence or the finding of Technical Staff.

Therefore, based upon the foregoing, on a motion by David K. Perdue, Vice-Chair, seconded by Carolyn J. Shawaker, with Walter S. Booth and Catherine G. Titus, Chair, in agreement, and Stanley B. Boyd not in agreement:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that Case No. S-2818, Petition of Twin Farms, Club, Inc. and T-Mobile Northeast, LLC is **denied**.

David K. Perdue
Vice-Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 9th day of February, 2012.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.